A

Hari Krishnen a/l Lakshmanan Servai v Public Prosecutor

B

HIGH COURT (IPOH) — CRIMINAL APPEAL NO 41S-20–10 OF 2016
ANSELM CHARLES FERNANDIS JC
28 SEPTEMBER 2018
[2018] MLJU 1580

C

Criminal Law — Sentence — Appeal against sentence — Appellant was found guilty under s 457 read together with s 511 of the Penal Code — Appellant sentenced to 12 months imprisonment and RM3,000 fine — Whether record of previous conviction should not be tendered by prosecution — Whether record of previous conviction incomplete — Whether offences stated in record of previous conviction were 'spent convictions' — Whether imprisonment sentence inappropriate — Criminal Procedure Code s 400 — Penal Code ss 457 & 511

D

The appellant was found guilty at the magistrate court for committing an offence under s 457 read together with s 511 of the Penal Code ('the Code') and sentenced to 12 months imprisonment. The appellant was also fined RM3,000 in default six months imprisonment. Dissatisfied with the decision, the appellant filed the present appeal against the conviction and sentence. The prosecution submitted that prior to the present case, the appellant had been sentenced for similar offence. This previous record was in a form called 'Maklumat Orang Yang Dilaporkan' ('P8').

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Held, dismissing the appeal against conviction and allowing the appeal against sentence:

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(1) The record of previous conviction P8 was incomplete and insufficient although the appellant admitted to the convictions therein. P8 should not have been tendered by the prosecution as proof of the previous conviction of the appellant as P8 was not in conformity with s 400 of the Criminal Procedure Code. The prosecution should have produced an extract certified under the hand of the officer having the custody of the records of the court or in the case of conviction either by the certificate, signed by the officer, in charge of the prison in which a punishment or any part of it was inflicted or by production of the warrant of the commitment (see paras 10–11).

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I

(2) The last offence under s 457 of the Code was committed sometime in 1985 which was 29 years from the date of the present charge. Even if P8 was considered, the offences stated in P8 were 'spent convictions' and should not be taken into consideration (see para 12).

(3) After taking into consideration all the mitigation factors including the fact that the appellant was now gainfully employed, the court found that an imprisonment sentence was inappropriate. The court set aside the sentences of 12 months imprisonment and fine RM3,000 and substituted it with RM6,000 fine in default six months imprisonment (see para 13).

[Bahasa Malaysia summary

Perayu didapati bersalah di mahkamah majistret kerana melakukan kesalahan di bawah s 457 dibaca bersama dengan s 511 Kanun Keseksaan ('Kanun') dan dihukum 12 bulan penjara. Perayu juga didenda sebanyak RM3,000 jika ingkar, enam bulan penjara. Tidak berpuas hati dengan keputusan itu, perayu memfailkan rayuan ini terhadap sabitan dan hukuman. Pihak pendakwaan mengemukakan bahawa sebelum kes ini, perayu telah dihukum kerana kesalahan yang sama. Rekod sebelumnya adalah dalam bentuk yang disebut 'Maklumat Orang Yang Dilaporkan' ('P8').

Diputuskan, menolak rayuan terhadap sabitan dan membenarkan rayuan terhadap hukuman:

(1) Rekod sabitan P8 yang sebelumnya tidak lengkap dan tidak mencukupi walaupun perayu mengaku bersalah bagi sabitan di dalamnya. P8 tidak sepatutnya ditender oleh pihak pendakwaan sebagai bukti sabitan terdahulu perayu kerana P8 tidak mematuhi s 400 Kanun Tatacara Jenayah. Pihak pendakwaan sepatutnya mengemukakan cabutan yang diperakui daripada pegawai yang menjaga rekod mahkamah atau dalam kes sabitan sama ada oleh perakuan itu, yang ditandatangani oleh pegawai itu, yang bertanggungjawab untuk penjara di mana hukuman atau mana-mana bahagian daripadanya telah dikenakan atau dengan pengeluaran waran komitmen (lihat perenggan 10–11).

(2) Kesalahan terakhir di bawah s 457 Kanun telah dilakukan pada tahun 1985 yang merupakan 29 tahun dari tarikh tuduhan sekarang. Walaupun P8 dipertimbangkan, kesalahan yang dinyatakan dalam P8 adalah 'sabitan selesai' dan tidak boleh dipertimbangkan (lihat perenggan 12).

(3) Setelah mengambil kira semua faktor peringanan termasuk hakikat bahawa perayu kini bekerja, mahkamah mendapati bahawa hukuman penjara adalah tidak sesuai. Mahkamah mengetepikan hukuman 12 bulan penjara dan denda RM3,000 dan menggantikannya dengan denda RM6,000 jika ingkar, enam bulan penjara (lihat perenggan 13).]

Notes

For cases on appeal against sentence, see 4(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4165–4210.

Cases referred to

Muhamad Yuzie bin Yusoh lwn Pendakwa Raya [2017] MLJU 2367; [2017] 1 LNS 2267, HC (refd)

Shah Reza bin Zulkifli dan lain-lain lwn Pendakwa Raya [2017] 8 MLJ 224; [2016] 1 LNS 390, HC (folld)

Legislation referred to

Criminal Procedure Code s 400

Penal Code ss 376(1), 377(b), 457, 511

Keshvinder Singh a/l Kashmir Singh (Sukdev Singh with him) (Kesh Dave & Partners) for the appellant.

Nurul Qistini bt Qamarul Abrar (Perak State Deputy Public Prosecutor) for the respondent.

Anselm Charles Fernandis JC:

INTRODUCTION

[1] The appellant was found guilty at the Tapah Magistrates Court for committing an of an offence under s 457 read together with s 511 of the Penal Code after a full trial. The appellant was sentenced to 12 months imprisonment. The sentence was to run from the date of sentence that is on 26 September 2016. He was also fined RM3,000 in default six months imprisonment. The charge against him read as follows:

> Bahawa kamu, pada 25/8/2014 jam lebih kurang 12.40 tengah malam, di rumah No. 18 Jalan 2, Taman Melati, Tapah di Daerah Batang Padang, di Negeri Perak, telah cuba melakukan pecah rumah dengan cara memecah pintu belakang dan masuk ke dalamnya, oleh itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 457/511 Kanun Keseksaan.

[2] The appellant then appealed to the High Court against his conviction and sentence. After hearing submissions by both parties this court dismissed the appeal against conviction but allowed the appeal against sentence. I had set aside the sentence of imprisonment 12 months and RM3,000 fine and substituted to it with a fine of RM6,000 in default six months imprisonment. The learned DPP being dissatisfied with the decision has filed an appeal against this decision. I now give my reasons for doing so.

[3] During the hearing of the appeal, the learned deputy public prosecution ('DPP') had submitted that prior to this the appellant had been sentence for similar of sentence. The learned DPP then produced the previous record of the appellant. This previous record was in a form of 'Maklumat Orang Yang Dilaporkan' ('P8'). It was signed by an officer which was not specifically named

but had the stamp of 'Unit Risikan Jenayah (URJ) Ibu Pejabat Polis Daerah Tapah, Perak'. From the layout of P8 it would seem to be a computer generated document. The document is reproduced as below:

MAKLUMAT ORANG YANG DILAPORKAN CETAK BATAL

Nama HARI KRISHNAN A/L LAKSHMANAN

No KP Baru 630310-08-5297

No KP Lama/Polis/ Tentera 07253010

No Pasport

MAKLUMAT AN | FIZIKAL | GAMBAR | KESALAHAN

SENARAI KESALAHAN

No			NO REPOT	TARIKH REPOT	KESALAHAN	STATUS	NO RJ/IBA	NO CAP JARI	NO RUJUKAN
1			TAPAH/ 00003124/06		KK 457	TANGKAP		0	
2			TAPAH/ 00005528/06		KK 457	TANGKAP		0	
3			SLIM RIVER/ 00002272/07	17/10/2007	KK 380	TANGKAP	BA/08/0005035		
4			TAPAH/ 00001431/11	07/06/2011	KK 326	TANGKAP	BA/11/0004823		
5			TAPAH/ 00001337/83		KK 324	TANGKAP		1920/83	
6			TAPAH/ 00000696/84		KK 457	DIHUKUM		2528/85	79/84
7			TAPAH/ 00000843/84		KK 457	DIHUKUM		2527/85	104/84
8			TAPAH/ 00001473/84		KK 457	DIHUKUM		2484/85	205/84
9			TAPAH/ 00001593/84		KK 457	DIHUKUM		2493/85	283/85
10			TAPAH/ 00001651/84		KK 457	DIHUKUM		2487/85	259/84
11			TAPAH/ 00001916/84		KK 457	DIHUKUM		2485/85	261/84
12			TAPAH/ 00002028/84		KK 457	DIHUKUM		2526/85	290/84
13			TAPAH/ 00002337/84		KK 457	DIHUKUM		2525/84	345/84
14			TAPAH/ 00001091/85		KK 457	DIHUKUM		2483/85	182/85
15			TAPAH/ 00001147/85		KK 457	DIHUKUM		2471/85	207/85
16			TAPAH/ 00001212/85		KK 457	DIHUKUM		2475/85	218/85
17			TAPAH/ 00001381/85		KK 457	DIHUKUM		2477/85	244/85
18			TAPAH/ 00001526/85		MO 29 (1)				
19			TAPAH/ 00001569/85		KK 379	DIHUKUM		2483/85	278/85
20			TAPAH/ 00002854/86		KK 353	DIHUKUM		5239/86	474/86

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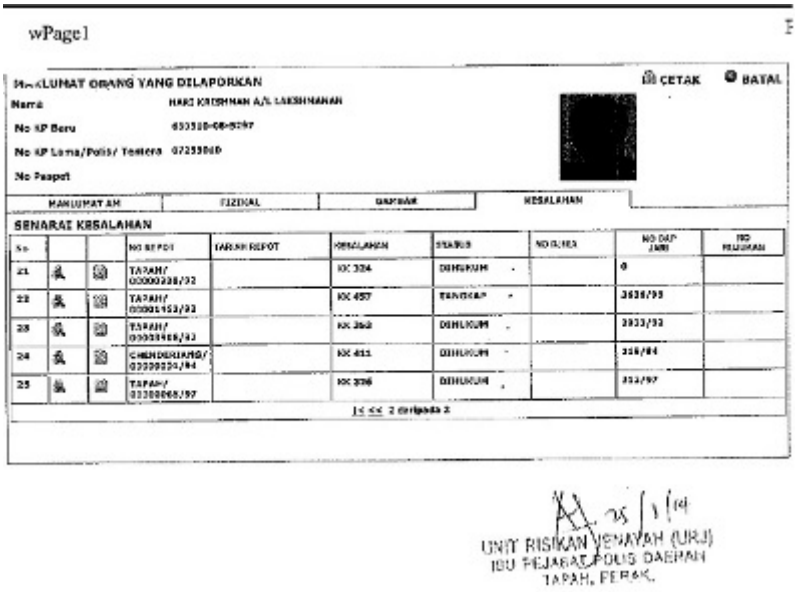
25/8/14

UNIT RISIKAN JENAYAH (URJ)
IBU PEJABAT POLIS DAERAH
TAPAH, PERAK.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MAKLUMAT ORANG YANG DILAPORKAN

CETAK BATAL

Nama HARI KRISHNAN A/L LAKSHMANAN

No KP Baru [redacted]

No KP Lama/Polis/ Tentera [redacted]

No Pasport

MAKLUMAT AM | FIZIKAL | GAMBAR | KESALAHAN

SENARAI KESALAHAN

Sn			No Repot	Tarikh Repot	Kesalahan	Status	No Kes	No Saf Jabi	No Peliharan
21			TAPAH/ 00000238/92		KK 324	DIHUKUM		0	
22			TAPAH/ 00001453/93		KK 457	DIHUKUM		3838/93	
23			TAPAH/ 00000468/93		KK 352	DIHUKUM		3933/93	
24			CHENDERIANG/ 00000324/84		KK 411	DIHUKUM		338/84	
25			TAPAH/ 00000068/97		KK 336	DIHUKUM		332/97	

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UNIT RISIKAN JENAYAH (URJ)
IBU PEJABAT POLIS DAERAH
TAPAH, PERAK.

[4] The document states that the appellant had purportedly been 'DIHUKUM' or sentenced 14 times for offences s 457 of the Penal Code. The last offence under s 457 according to P8 the last offence committed under s 457 was in 1985. There was however no indication in P8 as to the nature or duration of the sentences. Neither did it state the dates on which the appellant was convicted or whether the appellant was charged with any other person.

[5] What is the evident is that the document marked as P8 is not as to what is required in s 400 of the Criminal Procedure Code. Section 400 states as follows:

> 400(1) In any inquiry, trial or other proceeding under this Code a previous conviction or acquittal or an order directing any person to be under the supervision of the police may be proved in addition to any other mode provided by any law for the time being in force —
>
> (a) by an extract certified under the hand of the officer having the custody of the records of the Court whether of Malaysia or the Republic of Singapore in which that conviction or acquittal was had to be a copy of the sentence or order; or
>
> (b) in case of a conviction either by a certificate signed by the officer in charge of the prison in Malaysia or the Republic of Singapore in which the punishment or any part of it was inflicted, or by production of the warrant of commitment under which the punishment was suffered, together with, in each of those cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

(2) In case the officer in charge of any prison shall state in any certificate signed by him that the fingerprints which appear on the certificate are those of the person to whom the certificate relates, that certificate shall be evidence of the fact so stated.

(3) Every Court shall presume to be genuine every document purporting to be a certificate of conviction and purporting to be signed by the officer in charge of any prison in Malaysia or the Republic of Singapore, and shall also presume that the officer by whom the document purports to be signed was when he signed it the officer in charge of the prison mentioned in that document.

[6] In the case of *Shah Reza bin Zulkifli dan lain-lain lwn Pendakwa Raya* [2017] 8 MLJ 224; [2016] 1 LNS 390 the first, third and fourth accused were charged in the sessions court with the offence of rape of a girl below aged of 16 under s 376(1) of the Penal Code. The second accused was charged under s 377(b) of the Penal Code. The learned sessions court judge had sentenced the accused persons as follows:

i. The First Accused/First Appellant — 9 years imprisonment and 10 strokes of rotan

ii. The Third Accused/Second Appellant — 19 years imprisonment and 16 strokes of rotan

iii. The Fourth Accused/Third Appellant — 11 years imprisonment and 15 strokes of rotan

[7] The first, third and fourth accused were not satisfied and had appealed to the High Court. After hearing the appeal, the High Court had decided to dismiss the appeal against the conviction but allowed the appeal against sentenced in following manner:

i. The First Accused/First Appellant — sentences reduce to 8 years imprisonment and 8 strokes of rotan

ii. The Third Accused/Second Appellant — sentences reduce to 14 years imprisonment and 10 strokes of rotan

iii. The Fourth Accused/Third Appellant — sentences reduce to 8 years imprisonment and 8 strokes of rotan

[8] In reducing the sentences, the learned High Court judge took into the consideration that the previous convictions of the third accused/second appellants were in the form similar to the one in P8. The document was marked P27 in that case. The learned High Court judge stated there the following:

38. Mahkamah Tinggi ini menelitinya dan mendapati ianya tidak lengkap dan hanya maklumat untuk saringan awal polis semata-mata bukannya untuk dikemukakan kepada mahkamah untuk dijadikan asas pemberatan terhadap hukuman.

39. Tujuan P27 sekadar memberitahu bahawa tertuduh mempunyai rekod lampau semata-mata. Tuan HMS tidak sepatutnya mengambil ringan di dalam menerima masuk rekod jenayah lampau hanya berpandukan P27 tanpa bukti lebih ketat.

40. Rekod asal Pusat Pendaftaran Rekod Jenayah Malaysia dan Singapore 'PPRJ' adalah amat berbeza dengan P27 ini yang dikenali dengan 'kompol'. Di dalam Rekod PPRJ akan didapati terdapat maklumat lengkap tarikh hukuman; seksyen kesalahan dihukum; mahkamah mana; nombor kes: hukuman yang dijatuhkan.

41. P27 adalah rekod kesalahan saringan awal yang membolehkan pihak pendakwaan atau polis jika hendak membuktikan kesalahan lampau perlu mendapatkan PPRJ yang asal yang mempunyai cap jari tertuduh dan maklumat terperinci akan hukuman lampau. Maklumat di dalam 'kompol' ini kadang-kadang terkeliru dengan rekod tertuduh pernah ditangkap bukan rekod hukuman lampau.

[9] The learned High Court judge stated that the record of convictions in the form of P27 was not complete and were merely initial information for police use. It was not meant for it to be produced in court and used as a basis to enhance sentence. The appeal to the Court of Appeal in *Shah Reza Zulkifli & 2 lg lwn Pendakwa Raya* (No Fail W-09–119–03 of 2016) by the prosecution was dismissed. See case of *Muhamad Yuzie bin Yusoh lwn Pendakwa Raya* [2017] MLJU 2367; [2017] 1 LNS 2267.

[10] I agree with the views expressed in *Shah Reza bin Zulkifli*. I find that the record of previous conviction P8 in this case to be incomplete as well as insufficient although the appellant admitted to the convictions therein. P8 should not have been tendered by the prosecution as proof of the previous conviction of the appellant as P8 is not in conformity with s 400 Criminal Procedure Code.

[11] The prosecution should have produced an extract certified under the hand of the officer having the custody of the records of the court or in the case of conviction either by the certificate, signed by the officer, in charge of the prison in which a punishment or any part of it was inflicted or by production of the warrant of the commitment, see also *Muhamad Yuzie bin Yusoh*.

[12] I had also taken into account the fact that even if P8 is considered the offences stated in P8 are 'spent convictions' and should not be taken into consideration. The last offence under s 457 was committed sometime in 1985 which is 29 years from the date of the present charge.

[13] In the upshot after taking into consideration all the mitigation factors including the fact that the appellant is now gainfully employed. I find that an imprisonment sentence is inappropriate. I set aside the sentences of 12 months imprisonment and fine RM3,000 replace it with RM6,000 fine in default six months imprisonment.

Appeal against conviction dismissed; appeal against sentence allowed.

Reported by Dzulqarnain Ab Fatar